IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IJEAMAKA EKWEANI, *et al.*	:	
	:	
v.	:	CIVIL NO. CCB-07-3432
	:	
BOARD OF EDUCATION OF HOWARD COUNTY, *et al.*	:	

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MEMORANDUM

Now pending in this case brought by Ijeamaka Ekweani on behalf of herself and her daughter Elonna Ekweani (together "plaintiffs") are the motions to dismiss by defendants Howard County Board of Education (the "Board") and Diane Mikulis ("Mikulis") (together "defendants"). For the reasons that follow, the motion will be granted with leave to amend.

BACKGROUND

Elonna Ijeamaka ("Elonna") was a student at Jeffers Hill Elementary School ("Jeffers Hill"), a public school in Howard County, Maryland, from November, 1992 until her graduation in 1998. Upon enrolling in Jeffers Hill, Elonna began suffering from continual respiratory ailments stemming from her asthma. During her years there, she "suffered massive, near-death, acute respiratory failure two to three times a year" resulting in hospital stays, which "disrupted her education and rendered her disabled." (Compl. ¶ 15.) Elonna ceased suffering from acute respiratory failure after leaving the school and no longer required hospitalizations.

Subsequent to her departure from Jeffers Hill, Elonna and her mother, Ijeamaka Ekweani, learned that "hazardous, toxic conditions" existed there, including "lack of windows and lack of

adequate ventilation due to defective and substandard design and construction, substandard air quality, toxic mold, asbestos and other environmental conditions." (*Id.* ¶ 19.) According to the plaintiffs, the defendants knew of the conditions and took no action to abate them. The plaintiffs also contend that the defendants were aware of Elonna's condition while she was a student at Jeffers Hill and failed to take any corrective action, such as transferring her to another school.

As a result of her aggressive respiratory ailments and treatment, Elonna suffered permanent physical and emotional changes that caused her to be "the victim of harassment, ridicule and bullying by students and even some teachers" during her remaining years in Howard County Public Schools, "with all her complaints ... falling on deaf ears." (Compl. ¶ 24.)

On December 21, 2007, plaintiffs filed a complaint in this court alleging that the Board and Mikulis, Chairman of the Howard County Board of Education, violated Elonna's civil rights and committed various state torts by failing to abate the conditions at Jeffers Hill that caused Elonna's injuries.[1] On May 14, 2008, the defendants moved to dismiss the majority of plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). In their opposition, the plaintiffs seek leave to amend the complaint.

ANALYSIS

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint;

[1]Count I of the complaint alleges a violation of Title II of the Americans with Disabilities Act ("ADA"); Count II alleges a violation of the Individuals with Disabilities in Education Act ("IDEA"); Count III alleges a 42 U.S.C. § 1983 claim; Count IV alleges violations of the Maryland Code; Count V alleges nuisance; a separate Count V ("Count V-A") alleges premises liability; Count VI alleges intentional infliction of emotional distress; and Count VII alleges negligent infliction of emotional distress.

importantly, a Rule 12(b)(6) motion does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (internal quotation marks and alterations omitted). When ruling on such a motion, the court must "accept the well-pled allegations of the complaint as true," and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). Following the Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007), "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969 (quoted in *Goodman v. Praxair*, 494 F.3d 458, 466 (4th Cir. 2007)). Moreover, the "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65.

A. Federal Claims

In Count I, plaintiffs allege a claim under Title II of the ADA. Title II forbids public entities – including state and local governments and their departments, agencies, or instrumentalities – from excluding disabled persons from programs, services, or benefits "by reason of" their disabilities. 42 U.S.C. §§ 12131(1), 12132. Title II also imposes an affirmative obligation to make "reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and

services" to enable disabled persons to receive services or participate in programs or activities. 42 U.S.C. § 12131(2).

The defendants assert that Congress did not validly abrogate state sovereign immunity in enacting Title II and that Eleventh Amendment immunity bars the plaintiffs' claim. Whether claims under Title II of the ADA may be asserted against state public schools below the college level was not addressed in *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005) (holding Congress validly abrogated Eleventh Amendment immunity in the context of public higher education), and need not be decided at this time. Even assuming the defendants do not have immunity, the plaintiffs have failed to state a claim under the ADA as they have not alleged that they requested reasonable accommodations that were refused by the defendants, *see id.* at 488-89 (noting the ADA's requirement of only "reasonable" modifications as a limit on the scope of Title II),[2] nor have they alleged that any of the defendants' actions, or lack thereof, were motivated in any way by Elonna's purported disability, *see Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999). Based on the plaintiffs' failure to state a claim under Title II of the ADA, the court will dismiss Count I as to all defendants.[3]

Count II, brought under the IDEA, must be dismissed for failure to exhaust state administrative remedies. *See* 20 U.S.C. § 1415(f)(1)(a) (providing for an impartial due process

[2]In the complaint, the plaintiffs allege that despite knowing of the dangerous conditions at Jeffers Hill, the defendants failed to transfer Elonna to another school. They do not, however, allege that they requested a transfer to accommodate Elonna's disability that the defendants denied.

[3]Defendant Mikulis correctly asserts that the plaintiffs cannot bring suit against her in her individual capacity pursuant to Title II of the ADA, *see Pathways v. Town of Leonardtown*, 133 F.Supp.2d 772, 780 (D. Md. 2001) (citing *Baird*, 192 F.3d at 471).

hearing conducted by the state or local educational agency); *id.* § 1415(i)(2)(A) (providing a right to appeal the administrative hearing to federal district court). The Fourth Circuit has held that exhaustion of these administrative requirements is necessary, and that federal action is premature where plaintiffs have not exhausted state administrative remedies. *Scruggs v. Campbell*, 630 F.2d 237, 239 (4th Cir. 1980); *see also McGraw v. Bd. of Educ. of Montgomery County*, 952 F.Supp. 248, 254-55 (D. Md. 1997). Moreover, the plaintiffs seek only monetary relief for the alleged IDEA violation in the form of compensatory and punitive damages, and the Fourth Circuit concluded in *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 527 (4th Cir. 1998), that "[t]ort-like damages are simply inconsistent with IDEA's statutory scheme."[4] Accordingly, the court will dismiss Count II as to all defendants.

Count III is brought under 42 U.S.C. § 1983 for an alleged violation of the Equal Protection Clause of the U.S. Constitution. Section 1983 establishes liability for "every person" who, under the color of law, deprives an individual of any rights, privileges, or immunities secured by the Constitution. Both the Board and Mikulis acting in her official capacity are not considered "persons" under the statute, thus the court will dismiss the claims against these defendants. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that neither states nor state officers acting in their official capacities are "persons" under § 1983);

[4]While the plaintiffs request to amend their complaint to seek declaratory relief, their failure to exhaust administrative remedies proves fatal to their IDEA claim regardless of the type of relief sought. Moreover, the plaintiffs' contention that they failed to exhaust administrative remedies because they discovered the cause of Elonna's medical condition only after she left Jeffers Hill does not salvage their claim, but rather highlights its unsuitability to the remedial purposes of the IDEA. *See Sellers*, 141 F.3d at 527-28 (concluding that where parents discovered child's disability years after alleged violation occurred, consideration of IDEA claim "seem[ed] inconsistent with a scheme structured to encourage prompt resolution of special education disputes").

Lewis v. Bd. of Educ. of Talbot County, 262 F.Supp.2d 608, 614 (D. Md. 2003) (noting that "Maryland law ... treats the county school boards as agents of the state").[5]

State actors may be sued in their individual capacity for actions they take under color of state law that cause the deprivation of a federal right. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Here, however, the plaintiffs' complaint is devoid of any factual allegations that Mikulis individually engaged in conduct that deprived Elonna of a federal right. As plaintiffs have failed to put forth factual allegations that "raise a right to relief above the speculative level," *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007), their § 1983 claim against Mikulis acting in her individual capacity will be dismissed.

B. State Law Tort Claims

In Count V, the plaintiffs allege a claim of nuisance. In Maryland, a private nuisance is a civil matter involving the disturbance of an individual's rights in land, *Rosenblatt v. Exxon Co., U.S.A.*, 642 A.2d 180, 190 n.8 (Md. 1994), not injury to persons. Accordingly, the court will dismiss Count V as to all defendants.[6]

The plaintiffs allege intentional infliction of emotional distress in Count VI and negligent

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[5]The plaintiffs' contention that Maryland has waived Eleventh Amendment immunity for actions against county school boards up to $100,000, *see* Md. Code Ann., Cts. & Jud. Proc. § 5-518, is misplaced, as any waiver of immunity does not affect the Supreme Court's holding in *Will* that states and their agents are not "persons" under § 1983, *see* 491 U.S. at 66-67 (noting the distinct scopes of the Eleventh Amendment and § 1983).

[6]The plaintiffs contention that they are seeking redress for a public, as opposed to private, nuisance does not salvage their claim. A private person may seek injunctive relief against a public nuisance, which, in Maryland, is a criminal offense involving an interference with the community at large, only if she owns property injured by the nuisance. *Hoffman v. United Iron and Metal Co., Inc.*, 671 A.2d 55, 64 n.9 (Md. App. 1996).

infliction of emotional distress in Count VII. The tort of negligent infliction of emotional distress is not recognized in the state of Maryland, and will therefore be dismissed as to all defendants. To establish a claim for intentional infliction of emotional distress, the plaintiffs must show that: (1) the conduct in question was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress was severe. *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977). Recognizing that this tort "is to be used sparingly and only for opprobrious behavior that includes truly outrageous conduct," *Kentucky Fried Chicken Nat'l Mgmt. Co. v. Weathersby*, 607 A.2d 8, 11 (Md. 1992), it does not appear that the plaintiffs have pled or would be able to plead facts sufficient to demonstrate the level of extreme and outrageous conduct causing severe emotional distress that is required to support an intentional infliction of emotional distress claim. Accordingly, the court will dismiss Count VI as to all defendants.

C. Ijeamaka Ekweani's Claims

Any claim brought by Ijeamaka Ekweani on her individual behalf is barred by Maryland's three-year statute of limitations for civil actions, Md. Code Ann., Cts. & Jud. Proc. § 5-101, as the alleged harm occurred while Elonna was a student at Jeffers Hill more than three years ago. *See Garay v. Overholtzer*, 631 A.2d 429, 439 (Md. 1993) (concluding that parents' claims for injuries to a minor child were not tolled during the child's infancy and, thus, were time-barred by Maryland's three-year statute of limitations); *see also Causey v. Balog*, 162 F.3d 795, 804 (4th Cir. 1998) (applying Maryland's general three-year statute of limitations to a § 1983 action); *Kohler v. Shenasky*, 914 F.Supp. 1206, 1211 (D. Md. 1995) (same for ADA claim).

Any claim by Elonna Ekweani must be brought by her, as she has reached the age of majority.

CONCLUSION

For the foregoing reasons, the court will dismiss with prejudice all claims brought by Ijeamaka Ekweani on her individual behalf. As to Elonna Ekweani's claims, the court will dismiss with prejudice Counts II (IDEA), V (nuisance), VI (intentional infliction of emotional distress), and VII (negligent infliction of emotional distress) as to all defendants; Count I (ADA) as to defendant Mikulis acting in her individual capacity; and Count III (§ 1983) as to the Board and Mikulis acting in her official capacity. The court will dismiss without prejudice Count I as to the Board and Mikulis acting in her official capacity, and Count III as to Mikulis acting in her individual capacity. The plaintiffs requested leave to amend these counts,[7] and they will be given 21 days to seek leave to do so, if they can cure the deficiencies noted above.

The defendants have not moved to dismiss Count IV and Count V-A (premises liability) of the complaint, but as those are purely state law claims the court may decline to exercise supplemental jurisdiction under 28 U.S.C. 1367(c) if no federal claims survive.

A separate order follows.

December 31, 2008
Date

/s/
Catherine C. Blake
United States District Judge

[7]While the plaintiffs also requested leave to amend Counts II and VI of the complaint, those claims will be dismissed with prejudice.

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ORDER

For the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that:

1. the motion to dismiss (docket entry no. 11) filed by defendants Howard County Board of Education ("Board") and Diane Mikulis ("Mikulis") is **GRANTED**;

2. all claims brought by plaintiff Ijeamaka Ekweani on her individual behalf are **DISMISSED with prejudice**;

3. Count I as to defendant Mikulis acting in her individual capacity; Count III as to the Board and Mikulis acting in her official capacity; and Counts II, V (Nuisance), VI, and VII as to all defendants on behalf of plaintiff Elonna Ekweani are **DISMISSED with prejudice**;

4. Count I as to the Board and Mikulis acting in her official capacity, and Count III as to Mikulis acting in her individual capacity on behalf of plaintiff Elonna Ekweani are **DISMISSED without prejudice**; and

5. plaintiff Elonna Ekweani may seek leave to amend the Complaint to cure deficiencies as to Counts I and III within 21 days of the date of this order.

December 31, 2008
Date

/s/
Catherine C. Blake
United States District Judge